IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Appeal No. 1619-SB of 2004

Date of Decision: October 10, 2007

Paramjit Singh

Appellant

VERSUS

State of Punjab

Respondent

Criminal Appeal No. 1636-SB of 2004

Ronqi Ram

Appellant

VERSUS

State of Punjab

Respondent

Criminal Appeal No. 2049-SB of 2004

Nek Singh and another

Appellants

VERSUS

State of Punjab

Respondent

Criminal Appeal No. 2046-SB of 2004

Bholi

Appellant

VERSUS

State of Punjab

Respondent

CORAM: HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.TPS Tung, Advocate,
for appellants Paramjit Singh, Ronqi Ram in
CRA Nos. 1619-SB of 2004 and 1636-SB of 2004.

Ms.Gagangeet Kaur, Advocate
for appellants Nek Singh and another in CRA No.2049-SB of 2004

Mr.Ajit Attri, Advocate and
Mr.Ashit Malik, Advocate
for the Bholi in CRA No.2046-SB of 2006

Mr.Shailesh Gupta, DAG, Punjab.

****

RANJIT SINGH J.

Through this order the above mentioned four connected appeals, filed by five different appellants, are being disposed of

together.

The appellants along with two others were prosecuted for an offence under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act") with the allegation that they were found in possession of 18 bags of poppy husk weighing 40 kgs. each carried in a truck in which the appellants were travelling. One of the co-accused, namely, Bhajan Singh son of Balkar Singh was found innocent and acquitted by the trial Court, whereas Inderjit Singh son of Darshan Singh is absconding and has been declared as a proclaimed offender. Remaining five accused are the appellants in the above noted four appeals. After their conviction, they have been sentenced to suffer identical imprisonment for a period of ten years each, coupled with fine of Rs. One lac each. In default of payment of fine, the appellants were further required to undergo R.I. for six months. They have now filed the above noted appeals.

The facts in brief are that on 19.6.1997, Inspector Rachhpal Singh, (now DSP), while posted as Incharge, CIA staff Patiala along with some other police officials had gone on patrolling duty towards village Wazirpur on Patiala Sangrur road. While present there Racchpal Singh, received a secret information to the effect that the appellants and their co-accused were indulging in the sale of poppy husk and further that they were taking poppy husk in truck bearing registration number PB-08L-6225, which they were to distribute in the villages Dilabarpura . Babu Singh was associated with the police party as an independent witness. Truck bearing registration number, referred to above, came from the side of

Sangrur and was intercepted. It was being driven by Inderjit Singh accused (proclaimed offender). Bhajan Singh, allegedly came out of the truck and ran away from the spot. He, as such, could not be apprehended by the police party. The appellants, who were sitting in the driver's cabin, however, were taken into custody. Inspector Rachhpal Singh apprised them about the search which he wanted to conduct beside giving them option that the search could be conducted in the presence of gazetted officer or a Magistrate if they so desired. When the appellants opted for being searched in the presence of a gazetted officer, message was sent and thereafter Narjinder Singh Sekhon, DSP reached the spot. The DSP disclosed his identity and gave the appellants an option for being searched in his presence, to which they agreed. The truck was accordingly searched, leading to recovery of 18 bags of poppy husk. Samples, weighing 250 gms each were drawn from each bag. Each bag on weighment was found containing 39 kgs. and 500 gms of poppy husk. The bags and the samples were separately sealed by Rachhpal Singh Inspector and his seals bearing impression 'RS' and that of DSP bearing 'NS' were affixed. Contraband was seized vide memo Ex.PF along with truck, its registration certificate, tarpaulin and plastic rope. Ruqa Ex.PS was sent by the Investigating Officer through Joginder Singh HC and accordingly FIR Ex.PS/1 was recorded at Police Station Sadar, Patiala. Personal search of accused Inderjit Singh (proclaimed offender) and that of Ronqi Ram, Nek Chand, Gulzar Singh and Bholi lead to recovery of Rs.500/- and a wrist watch, Rs.75/-, Rs.65/-, Rs.45/-, Rs.200/- and Rs.60/-

respectively which were also seized vide different memos. Case property was deposited with Joginder Singh MHC with seals intact on the day of incident itself. On 22.6.1997, Bholi accused was interrogated when she suffered a disclosure statement revealing that she has kept concealed certain ornaments of gold wrapped in a glazed paper near 'T' point of a road leading to Dilabarpur. The said ornaments were accordingly recovered and deposited with MHC Joginder Singh. Later Bhajan Singh accused was also arrested. Challan was filed, leading to trial, conviction and the award of sentences, as aforementioned.

Case of the prosecution is supported by the evidence of Bhupinder Singh MHC (PW-1), Gurinder Singh Inspector (PW-2), HC Chet Ram (PW-3), HC Joginder Singh (PW-4), Jang Singh Constable (PW-5), Bachan Ram Constable (PW-6), Rachhhpal Singh Inspector (now DSP) (PW-7) and DSP Narjinder Singh Sekhon (PW-8). ASI Balbir Singh was also examined and thereupon the evidence of prosecution was closed. The appellants when confronted with the incriminating evidence and the circumstances, pleaded innocence and their false implication. They examined MHC Sahib Singh as DW-1 and Sewa Singh as DW-2.

Learned counsel appearing for the appellants have raised manifold plea in support of their respective cases. It is first contended that prosecution miserably failed to prove the conscious possession of contraband by the appellants. Submission is that 18 bags of poppy husk were recovered from the body of the truck while these were lying underneath 150 bags of powder. The truck was

also covered with tarpaulin which was further tied with rope. Contention thus is that the appellants could not be presumed to be in either possession of this contraband or in conscious possession there of specially so when they all were concededly found sitting in the driver's cabin. This aspect is highlighted by pointing out that the owner and driver of the vehicle Inderjit Singh has evaded the trial and has been declared a proclaimed offender. It is urged that the appellants could very well have been innocent passengers in the truck when viewed in the light of the fact that owner who was driving the truck is yet to be arrested and prosecuted. He alone can or could explain the presence of contraband in the truck. It is then contended that seal in this case, after being used, was not handed over to any independent person and the possibility of the contraband so recovered being tampered with cannot thus be ruled out. To highlight this fact that the contraband may have been tampered, the counsel would refer to the evidence that the contraband along with its samples were initially deposited in the Malkhana of CIA staff and not in the police station where FIR was lodged. It is submitted that if the CIA stafft, after interception, could send Ruqa for registering the FIR in the police station Sadar, Patiala, then there is no justification for CIA police not to deposit the case property in the said Police Station instead of depositing the same in the Malkhana of CIA staff. Then, according to the counsel, no explanation or reasons are forthcoming as to why samples were taken out from the Malkhana of CIA staff on 23.6.1997 and deposited with the Malkhana of Police Station Sadar, Patiala. Though the samples were so taken out and deposited with

MHC of police station but strangely the case property still remained lying in the Malkhana of CIA staff again to take it out and deposited in Police Station Sadar, Patiala on 3.9.1997 i.e. after expiry of almost three months from the date of incident. For this act no reason or explanation is forthcoming. It is further urged that the police though stated to have joined independent witness during the search and recovery but he was not examined on the plea that he had been won over. The case against the appellants is thus supported by the police witnesses alone. It is thus stressed that it would not be safe to maintain the conviction of the appellants by relying upon the evidence of police witnesses alone. It is further urged that the police has failed to connect the appellants with the recovery in this case.

On the other hand, State counsel contends that there is no reason to doubt the police witnesses as two of them were holding a senior rank and one of them being a gazetted officer. To say that the prosecution succeeded in showing that the appellants were in conscious possession of the contraband, the counsel would refer to the secret information on the basis of which this FIR was recorded and the fact that this aspect was put to the appellants while being examined under Section 313 Cr.P.C.

There is not much dispute so far as the factual matrix of the case is concerned. The conceded position is that the appellants were seen occupying the driver's cabin of the truck, when it was intercepted by Inspector Rachhpal Singh. Bhajan Singh, one of the co-accused, succeeded in running away from the scene and was subsequently arrested and prosecuted. It is also not disputed that

the recovery of 18 bags of poppy husk was from the body of the truck and were lying under 150 bags of white powder. Case further is that these bags were covered by tarpaulin which were further tied with ropes. The first hurdle which the prosecution is to cross is to prove that the appellants were in conscious possession of these 18 bags recovered from the body of the truck. Except that, offer was given to the appellants for searching the truck in the presence of gazetted officers, no evidence apparently is produced to show if the contraband was in conscious possession of any of the appellants in any manner. The owner, who was driving the truck though arrested and prosecuted but has evaded the trial and is declared a proclaimed offender. The manner in which these bags of poppy husk were found lying underneath 150 powder bags may require some explanation from the driver of the truck who was also the owner. It may be possible to draw some presumption against driver and the owner but to assume conscious possession of the appellants, who were the passengers, would be difficult to urge on the basis of the evidence. The prosecution has not succeeded in showing as to in what capacity or how the appellants were occupying the cabin of the truck. These facts as disclosed in evidence would not be enough to show the contraband to be in conscious possession of the appellants. The counsel have justifiably relied upon the case of **Avtar Singh vs. State of Punjab , 2002 (4) RCR (Crl.) 180.** The facts in the case of **Avtar Singh (Supra)** appear to be identical to the facts of the present case. The Hon'ble Supreme Court has dealt with various aspects regarding conscious possession and also about the burden

that rests on the prosecution in such cases. As observed by the Hon'ble Supreme Court, possession is the core ingredient to be established, before the accused subjected to punishment under Section 15. It is only when the possession is established that the burden may shift to the accused to satisfactorily account for the same and only then the presumption may arise against him under Section 54 of the NDPS Act. It would be appropriate to notice the observations of the Hon'ble Supreme Court in the case of **Avtar Singh (Supra)**:-

> “Assuming that poppy husk comes within the expression poppy straw, the question, however, remains whether the prosecution satisfactorily proved the fact that the accused were in possession of poppy husk. Accepting the evidence of PW-4- the Head Constable, it is seen that appellant No.3 (accused No.4) was driving the vehicle loaded with bags of poppy husk. Appellants 1 and 2 (Accused Nos. 1and 2) were sitting on the bags placed in the truck. As soon as the vehicle was stopped by ASI (PW-2), one person sitting in the cabin by the side of the driver and another person sitting in the back of the truck fled. No investigation has been directed to ascertain the role played by each of the accused and the nexus between the accused and the offending goods. The word 'possession' no doubt has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together by the minimum

requisite element which has to be satisfied in custody or control over the goods. Can it be said, on the basis of the evidence available on record, that the three appellants-one of whom was driving the vehicle and other two sitting on the bags, were having such custody or control? It is difficult to reach such conclusion beyond reasonable doubt. It transpires from evidence that the appellants were not the only occupants of the vehicle. One of the persons who was sitting in the cabin and another person sitting at the back of the truck made themselves scarce after seeing the police and the prosecution could not establish their identity. It is quite probable that one of them could be the custodian of goods whether or not be was the proprietor. The persons who were merely sitting on the bags, in the absence of proof of anything more, cannot be presumed to be in possession of the goods. For instance, if they are labourers engaged merely for leading and unloading purposes and there is nothing to show that the goods were at least in their temporary custody, conviction under Section 15 may not be warranted. At best, they may be abettors, but, there is no such charge here."

In fact the case of the appellants appear to be on better footing than the accused in **Avtar Singh's case (Supra).** Like in **Avtar Singh's case (Supra)**, two persons in the present case have made themselves scare at the trial. No investigation is directed in

the present case to ascertain the role played by each of the accused and those who are not available for trial and the nexus between the appellants and those persons. Present one is a case where owner and driver of the truck is not available to face trial and prosecution. In **Avtar Singh's case (Supra),** even the driver was available but still conscious possession was not presumed against him. Appellants were not the only occupants like in the case of **Avtar Singh (Supra).** It is possible that the person absconding was custodian of the goods and even the proprietor he being owner of the truck. It is difficult to reach a conclusion beyond reasonable doubt that the appellants were in conscious possession or were the owners of this contraband recovered from the body of the truck. They were not shown to be having any control over the contraband. In **Avtar Singh's case (Supra)**, the appellants were found sitting on the bags but still it is held that in the absence of proof of anything more they cannot be presumed to be in possession of goods. It is observed that they could be labourer engaged merely for loading etc. Accordingly, I am of the view that the prosecution has not succeeded in showing conscious possession of the appellants over the contraband by any reliable and cogent evidence.

It is submitted that the prosecution cannot take any advantage on the basis of secret information to urge conscious possession of the appellants over the contraband,as the provisions of Section 42 of the NDPS Act were not followed. Submission is that if indeed any secret information was received by Inspector Rachhpal Singh, he was bound to follow the provisions of Section 42 of the

NDPS Act to rule out any possibility of it being an afterthought. Let us now take up the issue of secret information and that being the basis of submission that this would be sufficient to show conscious possession of the contraband by the appellants. FIR concededly is recorded on the basis of a secret information. The provisions of Section 42 of the Act would thus come into play. The police officer, receiving the secret information was bound to reduce it into writing. He was further under obligation to send information in this regard within 72 hours to his superior officer as is required under Sub Section 2 of the Section. The record does not show if this secret information received by Inspector Rachhpal Singh was reduced into writing or he sent copy thereof within 72 hours to his immediate superior officers. In this background, it will be doubtful to accept the story of secret information as projected by the prosecution. Though the truck was intercepted on the basis of secret information but this was not reduced into writing which would make it look doubtful and may show that no information was available with the police that appellants were bringing this poppy husk in the truck concerned. If it had been so, the Inspector, who is a senior officer, could not have failed to follow the mandate of law as provided under Section 42 of the Act. The section is held to be mandatory in the case of **Mohinder Kumar vs. The State, Panji, Goa, AIR 1995 SC 1157**. It is also held in **Ajim Khan vs. The State, 1996 Cr.L.J 3140** non compliance with Section 42 in spite of the fact that Investigating Officer had prior secret information would render the search and seizure invalid.

Independent witness is also not examined in the case. Though it is stated that he was won over, but still it would render this case to be one which is only supported by the evidence of police witnesses. There are not one but number of reasons for which it will not be safe to implicitly rely upon the evidence given by the police witnesses. They, in my view do not seem to have conducted themselves well, while investigating this case. No reasons are given as to why property was not deposited in the Malkhana of the Police Station Sadar, Patiala where the FIR was recorded. No evidence is led by the prosecution to show that this property was produced before the SHO as is required. Initially the samples and the property were deposited in the Malkhana of CIA staff, whereas FIR was lodged at Police Station Sadar, Patiala. Why and for what reason this property could not be taken for depositing in the Malkhana at Police Station Sadar, Patiala are not forthcoming? Strangely the samples were deposited after six days of their being drawn, but the case property kept lying in the Malkhana of CIA staff. Why it was so done is not explained. What had necessitated the shifting of samples to Police Station Sadar Patiala and the property remaining at CIA staff Malkhana is again not exaplained. Then there is nothing to show as to why the property was also shifted to the Malkhana of Police Station Sadar Patiala after expiry of nearly three months. Indeed if the CIA officials have been a bit vigilant and have deposited this property in the Malkhana of Police Station Sadar, Patiala, the allegation as now made on behalf of the appellants would not have stood. There is justification in the submission made

by counsel for the appellants that the seal in this case remained with the police officials of the CIA staff and the gazetted officers. The prosecution thus cannot rule out the possibility that this contraband or the sample, before being deposited in the Malkhana of Police Station Sadar, Patiala, were tampered or at least these could be tampered. It is one thing to say that the samples or the contraband were not tampered but the another to say that the possibility in this regard cannot be ruled out. This possibility is required to be ruled out by the prosecution itself for it to succeed. This aspect would further go to cast doubt on the prosecution story of the samples and the recovered contraband having been remained intact till its production before the Court. There are not one but number of circumstances which would go to cast doubt on the prosecution story. Even if the aspect of conscious possession, is left aside for sake of arguments then other infirmity makes it unsafe to sustain conviction. Reference is made to the case of **Sukhdev Singh @ Sukha vs. State of Punjab, 2006 (1) RCR (Criminal) 4,** to show that the seal was not given to independent witness and it is, thus, held that possibility of seal being tampered and substance changed in the container cannot be ruled out, leading to setting aside the conviction. The aspect of conscious possession and the requirement of proving the same has also been dealt with in this case. The counsel also relies upon the case of **Baldev Singh vs. State of Punjab, 2005 (1) RCR (Criminal) 823.** The Hon'ble Supreme Court held in that case that if it is established that the accused is not in conscious and intelligent possession and mere physical presence in proximity of the object is

not enough to bring home the charge against him under Section 15 of the Act. In this case the seal had also remained with the police till the discharge of the sample to Forensic Science Laboratory. Taking this aspect into consideration, the conviction of the appellant therein was set aside. All these considerations do come into play in the present case as well.

The grouse is also made by the counsel for appellant Bholi that she was searched by male police officer. She was required to be searched by the lady officer. In support of his submission, the counsel refers to the case of **Parkash Kaur vs. State of Punjab, 2006 (4) RCR (Criminal) 437**. It is also urged that this aspect of search and recovery of ornaments from Bholi would further dent the prosecution case as ultimately she was not charged and tried for any such allegation. It is also urged that the ornaments recovered from Bholi were of her own and had no relevance with this case and thus may indicate that she was already in custody of the police and falsely implicated in the present case under the NDPS Act. It appears strange to notice that the ornaments are shown recovered from 'T' point of a road leading to Dilabarpur. She was statedly travelling in a truck. When and at what time she kept these ornaments at 'T' point of road. No explanation as why she did so. How could she get out of truck and keep ornaments. Her claim that she was already in custody and implicated in this case may sound possible and probable. If indeed this recovery revealed any other offence then she was bound to be charged. It was not done. The prosecution has not been able to remove doubts in this regard which

would rather cast doubt on the prosecution story as such.

Taking into consideration the facts and evidence in totality, I am of the view that the prosecution has not succeeded in proving its case beyond reasonable doubt. Benefit of doubt must accrue to the appellants. Accordingly, the conviction of the appellants and sentence awarded to them cannot be sustained. Above said four appeals, as such, are allowed. The appellants shall be released of the consequences of the trial. If the appellants are in custody they shall be released forthwith unless needed in any other case.

(RANJIT SINGH)
JUDGE

October 10, 2007
anita